No. 78-336

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN BRETT ALLEN and FRANK LEWIS JACKSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 579 F. 2d 553.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1978. A petition for rehearing was denied on July 31, 1978 (Pet. App. 23). The petition for a writ of certiorari was filed on August 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion by denying petitioners' motions for a new trial based on the recantation of identification testimony against a co-defendant.

STATEMENT

1. In June 1975, after a jury trial in the United States District Court for the District of Colorado, petitioners and two co-defendants were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963. Petitioners were sentenced to five years' imprisonment and two years' special parole. The court of appeals affirmed. *United States* v. *John Brett Allen and Frank Lewis Jackson,* Nos. 75-1738 and 75-1739 (April 21, 1977), cert. denied, 434 U.S. 856 (1977).

The evidence underlying petitioners' convictions is summarized in the opinion of the court of appeals (Pet. App. 3-5). In brief, the government presented evidence that petitioners, together with unindicted co-conspirator Michael John Venus and co-defendants Gregory Weiss and Ivan Lustig, participated in a conspiracy to import marijuana into the United States for distribution in Colorado. At trial, Venus identified petitioners, Weiss, and Lustig as members of the conspiracy and related their participation in it. According to Venus, petitioner Jackson first approached him concerning the possibility that Venus, who is a pilot, could fly marijuana out of Mexico. Subsequently, Venus met with petitioners and their co-defendants Lustig and Weiss, who agreed to pay Venus $5,000 for each trip to Mexico. Thereafter, Venus rented an airplane with money obtained from petitioner Allen, and in August of 1974, Venus and Weiss made two trips to Mexico. On each trip, they purchased approximately 800 pounds of marijuana, which they returned to Colorado for distribution by the conspirators (Pet. App. 3). Venus' testimony was substantially corroborated by that of other government witnesses (Pet. App. 4).

2. On June 13, 1977, the district court held an evidentiary hearing on a motion for a new trial filed by

co-defendant Weiss. At the hearing, Venus recanted his trial testimony identifying Weiss as a party to the conspiracy. Venus testified that prior to the trial a federal agent had shown him a photograph of Weiss, who bore a strong resemblance to the co-conspirator with whom Venus had flown to Mexico to pick up marijuana (VII R. 15).[1] Venus had made the photographic identification of Weiss at that time, and he later identified him at trial (*id.* at 15-19). Venus explained that he had made the photographic and in-court identifications of Weiss because he was under much pressure and anxious "to get [the trial] over with" (*id.* at 18-19). At no time, however, did Venus discuss with any government official the possibility that his identification of Weiss was not certain (*id.* at 17, 19). Venus testified that after the trial he had met with Weiss for approximately 45 minutes, and had then realized that the man with whom he had gone to Mexico "had narrower shoulders and a smaller frame" than Weiss, and slurred speech, which Weiss did not (*id.* at 13-14, 36-38, 47-48). Venus therefore recanted his trial identification of Weiss, which he characterized as a "mistake" (*id.* at 18, 20, 53) that resulted from the pressure he was under, the photograph previously shown him, and the fact that Weiss was seated in court with the other defendants about whose identity Venus was certain because they had lived across the hall from him for two months (*id.* at 19-21, 46). Venus also testified for the first time at the hearing that he had received payments totalling $300 from the DEA during the period of his cooperation (*id.* at 16, 19, 24-25, 41-42).

The district court concluded that absent Venus' identification of Weiss, "the case would not have gone to the jury with respect to" Weiss; that Venus' trial

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[1] "R." refers by volume and page number to the seven-volume Record on Appeal.

testimony implicating Weiss was "[e]ssentially uncorroborated;" and that "the corroboration in the case [was] primarily that with respect to other defendants in the case" (VII R. 79-80). On the basis of Venus' recantation, the district court granted Weiss' motion for a new trial (*id.* at 80).[2]

3. Thereafter, petitioners filed motions for a new trial relying on the newly discovered evidence of Venus' recanted identification testimony and of the DEA payments to Venus. The district court denied the motions, finding that the testimony "in which Michael Venus recanted his identification of Mr. Weiss, [did] not affect the evidence against [petitioners] and that the misidentification did not prejudice the trial as to the [petitioners] and * * * that there [was] no basis for a new trial" (Pet. App. 25-26). The court of appeals affirmed, with one judge dissenting (Pet. App. 1-18).

ARGUMENT

Petitioners contend (Pet. 4-5) that the district court erred in denying their motions for a new trial based on the newly discovered evidence of Venus' recantation of testimony identifying Weiss.[3] They urge that review

[2]The indictment against Weiss was subsequently dismissed by the government.

[3]Although petitioners argued in the courts below that the evidence of the $300 payments by the DEA to Venus entitled them to a new trial, they have apparently abandoned that claim before this Court. In any event, at trial Venus testified at length concerning his cooperation with the DEA. He related that he had agreed to testify in exchange for immunity from prosecution (III R. 122) and that he had been motivated to cooperate not only by concern for the safety of pilots who were often killed smuggling narcotics (*id.* at 128, 176-177, 192), but also by his desire "to save" himself (*id.* at 147-150, 177). Accordingly, even though the jury was unaware of the $300 paid to Venus, it "had adequate information that [Venus] was trying to save his own skin." *United States* v. *Minichiello*, 510 F. 2d 576, 578

should be granted to resolve the question of the proper standard for determining whether newly discovered evidence of perjury or recanted testimony requires a new trial.

In order to prevail on a Rule 33 motion for a new trial on the basis of newly discovered evidence, a defendant must show that (1) the evidence was discovered after trial, (2) the failure to learn of the evidence was not the result of lack of diligence, (3) the new evidence is not merely cumulative or impeaching, (4) the evidence is material to the principal issues involved, and (5) the evidence is of such a nature that it would probably produce an acquittal. *E.g., United States* v. *Bryant,* 563 F. 2d 1227, 1231 (5th Cir. 1977), cert. denied, No. 77-5967 (April 17, 1978); *United States* v. *Schwartzbaum,* 527 F. 2d 249, 254-255 (2d Cir. 1975), cert. denied, 424 U.S. 942 (1976).

However, when it is shown that the prosecution's case included perjured or recanted testimony that took the defendant by surprise at trial, some courts of appeals, following the leading case of *Larrison* v. *United States,* 24 F. 2d 82, 87 (7th Cir. 1928), require a new trial if "the jury *might* have reached a different conclusion" without the false testimony (emphasis in original). *E.g., United States* v. *Wallace,* 528 F. 2d 863, 866 (4th Cir. 1976); *United States* v. *Meyers,* 484 F. 2d 113, 116 (3d Cir. 1973); *United States* v. *Smith,* 433 F. 2d 149, 151 (5th Cir. 1970). By contrast, the Second Circuit has declined to follow *Larrison* in cases where (as here) there is false or recanted prosecution testimony, but no government misconduct in presenting it. *United States* v. *Stofsky,* 527

(5th Cir. 1975); cf. *United States* v. *Rosner*, 516 F. 2d 269, 273 n.2 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976). In these circumstances, the evidence was not so material as to require a new trial under *Giglio* v. *United States*, 405 U.S. 150 (1972).

F. 2d 237, 245-246 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).[4] The *Stofsky* court concluded that the proper standard for determining whether a new trial is warranted is "whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness" (527 F. 2d at 246).

Assuming that the difference in the formulations adopted by the various courts is more than simply semantic,[5] the distinction between these standards is of no consequence in the instant case. As the court of appeals correctly held (Pet. App. 9), the application of either standard "dictates affirmance of the trial court's order denying the motions for a new trial in this case." Venus testified that his erroneous in-court identification of Weiss had been influenced by a photograph of Weiss he was shown several months after the events in question, Weiss' presence at trial with his co-defendants, whose identity Venus was sure of, and the pressure Venus felt he was under (Pet. App. 11-12). In contrast, Venus' identification of petitioners rested on a far firmer foundation, and during the hearing at which he recanted his identification of Weiss, Venus never wavered in his identification of petitioners and Lustig. Venus' testimony indicated he knew petitioners well, and could hardly have misidentified them: he stated that during the period of the conspiracy Lustig had rented an apartment across the hall from him,

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[4]However, when the prosecution presents false testimony, and knew or should have known of the falsity, a new trial is warranted if "the false testimony could * * * in any reasonable likelihood have affected the judgment of the jury." *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (quoting from *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)).

[5]But see *United States* v. *Stofsky*, *supra*, 527 F. 2d at 246 & n.10.

that petitioners "hung out there," and that he (Venus) had "close contact" with them because "[t]hey played Ping-pong in my apartment on many occasions" (VII R. 46). Moreover, in contrast to the case against Weiss, which consisted almost exclusively of the testimony of Venus and therefore depended on the identification by him, there was substantial evidence corroborating the details supplied by Venus and implicating petitioners (see Pet. App. 10-11).

In these circumstances, the court of appeals properly affirmed the district court's conclusions (Pet. App. 25-26) that Venus' recantation did "not affect the evidence against [petitioners]" and accordingly provided no basis for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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